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No. 93-____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

OWENS-CORNING FIBERGLAS CORPORATION,

*Petitioner,*

—v.—

WILLIAM DUNN,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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October 25, 1993

## QUESTIONS PRESENTED

1. Do additional awards of punitive damages in mass-tort litigation become unconstitutionally excessive under the Due Process Clause where the defendant's overall liability for compensatory damages and other expenses (including other punitive-damages awards) will itself suffice to inflict whatever punishment and deterrence might be necessary -- and where further punitive-damages awards could jeopardize future plaintiffs' ability to obtain compensation for their injuries?

2. Do additional awards of punitive damages in mass-tort litigation violate the Due Process Clause where the defendant is being punished repeatedly and without limitation for a single course of conduct?

3. Do additional awards of punitive damages in mass-tort litigation violate the Due Process Clause where punitive damages are no longer needed to punish and deter the defendant *and* where they constitute repetitive and unlimited punishment for the same course of conduct?

## LIST OF PARTIES AND RULE 29.1 STATEMENT

Petitioner Owens-Corning Fiberglas Corporation was the defendant in the United States District Court for the District of the Virgin Islands and the appellant in the United States Court of Appeals for the Third Circuit. Respondent William Dunn was the plaintiff in the District Court and the appellee in the Court of Appeals.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Owens-Corning Fiberglas Corporation states that it is a publicly held corporation, has no parent company and has no subsidiaries other than wholly owned subsidiaries.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. 93-____

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OWENS-CORNING FIBERGLAS CORPORATION,

*Petitioner,*

v.

WILLIAM DUNN,

*Respondent.*

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Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

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# PETITION FOR A WRIT OF CERTIORARI

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Petitioner Owens-Corning Fiberglas Corporation ("Owens-Corning") respectfully petitions this Court to grant a writ of

certiorari to review the judgment of the *in banc* Court of Appeals for the Third Circuit, filed July 27, 1993.

## OPINION BELOW

The Court of Appeals' *in banc* opinion is reported at 1 F.3d 1371 (3d Cir. 1993), and is reprinted in the appendix at 1a-85a. The district court's opinion is reported at 774 F. Supp. 929 (D.V.I. 1991), and is reprinted in the appendix at 86a-128a.

## JURISDICTION

The judgment of the *in banc* Court of Appeals was entered on July 27, 1993. This petition has been filed within 90 days of that ruling. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment.

## CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Due Process Clause of the Fifth Amendment to the United States Constitution, reprinted at 133a.

## STATEMENT OF THE CASE

This petition seeks review of a $1 million punitive-damages judgment against Owens-Corning for its sale and manufacture of asbestos-containing products 20 to 40 years ago. Based on those decades-old activities, Owens-Corning now faces an *uninsured*

liability of about $1 billion as well as 29 punitive-damages judgments totalling more than $56 million to date.

Owens-Corning is just one of the many defendants in the nationwide asbestos litigation, which presents "an unparalleled situation in American tort law." *In re School Asbestos Litig.*, 789 F.2d 996, 1000 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). The litigation involves hundreds of thousands of claims, tens of billions of dollars, numerous bankruptcies and insolvencies, and a risk that the defendants' funds might run out before many injured plaintiffs can receive compensation.

Particularly in this context, but in other mass-tort litigations as well, serious questions arise about the continued availability of punitive damages. Punitive damages are not needed to punish or deter -- because the staggering liability for compensatory damages and other expenses fulfills those purposes, and the alleged misconduct ended many years ago. Punitive damages also inflict multiple and unlimited punishment for the same course of conduct, in violation of due-process principles. In addition, "the unrestricted and simultaneous payment of punitive damages and compensatory damages will inevitably bankrupt all of the defendants in the asbestos litigation" and may deprive future deserving plaintiffs of compensation. *Abate v. ACandS, Inc.*, No. 89236704, slip op. at 23 (Baltimore Cir. Ct. Dec. 9, 1992), *reprinted in* Mealey's Litig. Reports - Asbestos ("Mealey's"), Dec. 18, 1992, at C-1, C-12.

## A. The Asbestos Litigation Crisis

The asbestos litigation is the ultimate example of mass-tort litigation. More than 250,000 asbestos-related personal-injury claims have been filed to date, *see* Stefan Fatsis, *Asbestos Scourge: New Attitude, Less Removal, Perennial Litigation*, Associated Press, Aug. 24, 1993, and some 160,000 claims now are pending in the federal and state courts [43a].[1] According to one estimate cited by the Third Circuit dissenters, more than 668,000 new claims will be filed between 1990 and 2049. [43a.]

The expenses associated with the asbestos litigation have been astronomical. One report estimated that asbestos defendants had paid $7 billion by early 1991 and ultimately could spend as much as $50 to $100 billion. Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next?*, Forbes Magazine, Feb. 18, 1991, at 75, 79. Others have put the costs at $12 to $20 billion to date. Ruth Gastel, *Occupational Disease: Insurance Issues*, Insurance Information Institute Reports, May 1993; Stuart E.

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1. Between 1986 and June 30, 1993, over 65,000 new cases were filed in federal courts alone. *See* Judicial Admin. Office, *Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit During the 12 Month Periods Ended June 30, 1988 Through 1992* and *Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit During the 12 Month Periods Ended June 30, 1992 and 1993*; *see also In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 745 (E. & S.D.N.Y. 1991) ("*Findley v. Blinken*"), *vacated*, 982 F.2d 721 (2d Cir. 1992), *on rehearing*, 993 F.2d 7 (2d Cir. 1993).

   Knowledgeable commentators have estimated the current number of state-court suits to be twice the number of federal-court filings. *See* Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 Cardozo L. Rev. 1967, 1970 & n.6 (1992).

Rickerson, *How the Asbestos Litigation Problem Can Be Solved*, Corporate Legal Times, Mar. 1993, at 10.

These costs have had a catastrophic impact on many asbestos defendants. At least 15 former manufacturers or distributors of asbestos-containing products -- representing more than 50% of the historical liability in asbestos personal-injury cases -- have sought bankruptcy protection because of asbestos claims, and others are experiencing such financial difficulties that they cannot pay their historical liability shares.[2] The bankruptcy and financial instability of so many principal defendants have put increasingly greater pressure on solvent defendants to pay more than their historical liability shares under principles of joint and several liability. *See, e.g., Defendant's Annual Filings Provide New Info on Litigation -- Fibreboard*, Mealey's, Apr. 5, 1991, at 35 (in one trial, Fibreboard's verdict was increased by about $65.4 million because of Celotex's bankruptcy); Motley & Rice, *supra*, at 25.[3]

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2. *See Findley v. Blinken*, 129 B.R. at 747; State Judges Asbestos Litig. Comm., *Megatorts: The Lessons of Asbestos Litigation*, July 21, 1992, *reprinted in* Mealey's, Nov. 20, 1992, at B-1, B-2; Ronald L. Motley & Joseph F. Rice, *The Carlough Settlement -- Blueprint for a Sane Resolution to the Asbestos Problem*, Mealey's, July 1, 1993, at 24, 25; *see also Keene Corp. v. Fiorelli*, No. CV 93-2129, 1993 U.S. Dist. Lexis 10700 (E. & S.D.N.Y. July 1, 1993) (granting Keene's petition for limited-fund status and provisionally certifying a limited-fund class), *injunction stayed*, No. 93-2129 (2d Cir. Aug. 10, 1993).

3. The following numbers can only suggest the asbestos litigation's impact on several asbestos companies. **Johns-Manville Corporation:** 17,000 claims pending, and 35,000 more expected, with total value of more than $1 billion, when Manville filed for bankruptcy in 1982; more than 170,000 new claims actually filed against the Manville Trust by February 1991; 47,000 more claims expected; Trust's assets valued in 1991 at

(continued...)

The profusion of asbestos cases also has taxed judicial resources. The Ad Hoc Committee on Asbestos Litigation appointed by the Chief Justice found that federal asbestos cases in 1990 constituted more than six percent of all civil filings, and it concluded that "the large volume of asbestos cases, both in federal and state courts, and the resulting delays and costs, have resulted in a denial of justice and fundamental fairness to litigants." Ad Hoc Committee on Asbestos Litigation, *Reports of the Proceedings of the Judicial Conference of the United States* 33 (1991). Similarly, in 1991, the federal Judicial Panel on Multi-District Litigation transferred virtually all federal asbestos cases to a single district court -- despite its previous refusals to do so -- because "this litigation has reached a magnitude . . . that threatens the administration of justice." *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 418 (J.P.M.L. 1991).

The continued availability of punitive damages has greatly exacerbated these problems in several ways.

*First*, from a plaintiff's perspective, punitive damages are a windfall. Their availability thus encourages plaintiffs to proceed to trial in the hope of receiving large awards, and these additional trials congest court dockets and increase litigation costs for all

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3.(...continued)

$2.1 to $2.7 billion; asbestos liabilities valued at $6.5 billion. *Findley v. Blinken*, 129 B.R. at 751-65.

**Keene Corporation:** 190,000 personal-injury claims since 1977; 98,000 claims pending as of 1993; 170,000 new claims expected; indemnity and defense expenditures of $447 million as of 1993; projected total liability of $681.1 million for pending and future claims; net assets of $51.4 million. *Keene v. Fiorelli, supra*, 1993 U.S. Dist. Lexis 10700 at *20-26.

parties -- as well as for non-asbestos litigants. *See* Judge William W. Schwarzer, ***Punishment Ad Absurdum***, Cal. Law., Oct. 1991, at 116; *see also* Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1868 (1992) (plaintiffs' attorneys "are far more likely to litigate these cases when the potential for punitive damages exists").

*Second*, punitive damages lead to more lawsuits. "[T]he largest percentage of claimants exhibit only minor asbestos-related injury and often have no measurable impairment or disability at the time they file their cause of action." *In re Asbestos Cases*, 224 Ill. App. 3d 292, 586 N.E.2d 521, 523 (1st Dist. 1991); *see also* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541, 549 (1992) (studies estimate that 25% to 75% of all claimants are unimpaired). These unimpaired claimants often cannot hope to recover significant compensatory damages, but the potential for obtaining punitive damages makes a lawsuit much more attractive and boosts the settlement value of claims, thereby diverting defendants' diminishing resources to persons who are not even injured. [51a (Weis, J., dissenting) (punitive damages are "a weighty factor in settlement negotiations and inevitably result[] in a larger settlement agreement than would ordinarily be obtained").] *See* Oliver & Spencer, *supra*, at 79 (punitive damages are "a very powerful weapon used by the plaintiffs' lawyers to persuade companies to settle").[4]

4. The fact that punitive damages are obtainable in many jurisdictions under a simple preponderance-of-the-evidence standard makes them even more of a threat than they otherwise might be.

*Third*, and perhaps most importantly, awards of punitive damages in addition to staggering compensatory liability increase the drain on asbestos and other mass-tort defendants' resources and can deprive future claimants of compensation. *See, e.g., Abate, supra*, slip op. at 24, Mealey's, Dec. 18, 1992, at C-12 ("simultaneous payment of punitive damages and compensatory damages will hurt crucially those claimants who are found to be entitled to compensation in the future"). "To permit the first plaintiffs to receive punitive damages when later plaintiffs have yet to come to trial seems foolish and unfair." Judge William W. Schwarzer, *supra*, at 116; *accord Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1055 ("*Juzwin I*") ("priority should be given to compensating those who have been injured rather than conferring windfalls on those who have already been compensated"), *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989) ("*Juzwin II*").

## B. Owens-Corning's Situation

Virtually all asbestos-related claims against Owens-Corning arise from its sale and manufacture of Kaylo, an asbestos-containing insulation product that the company began to sell in 1953 and began to manufacture in 1958. Owens-Corning stopped making that product in 1972, and all sales ended in 1973. [JA 1941-42.[5]] During the entire period between 1953 and 1973, total Kaylo sales amounted to about $140 million, and total Kaylo profits were about $1.4 to $7.7 million. [35a n.24, 50a.]

By May 31, 1991, when Owens-Corning filed its post-trial motions in this case, it had received 148,780 asbestos-related

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5. "JA" refers to the Joint Appendix submitted to the Third Circuit.

personal-injury claims in all 50 states, the District of Columbia, Guam and the Virgin Islands. [JA 1942.] By the end of 1992, Owens-Corning had received a total of 186,000 claims. *See More Annual Filings Detailed*, Mealey's, June 18, 1993, at 12 ("1992 Annual Report"). New case receipts have exceeded 20,000 per year for the past six years. *See* JA 1943; 1992 Annual Report.

By May 31, 1991, Owens-Corning had resolved (*i.e.*, paid) 62,588 claims, and another 86,192 were pending. [JA 1942.] By the end of 1992, the company had resolved about 101,100 claims, but 85,000 still were pending. *See* 1992 Annual Report. In 1990 through 1992 alone, Owens-Corning resolved 54,800 claims for $539 million in indemnity costs -- an average of about $10,000 per claim -- and agreed in principle to settle another 22,800 cases, with payments for those claims in future years expected to be higher than the 1990-1992 average. *Id.*

At the end of 1990, Owens-Corning had $1.26 billion in unexhausted product-liability insurance coverage (including $230 million in deductibles) applicable to asbestos personal-injury claims. [JA 2007.] By the end of 1992, the unexhausted insurance had decreased to $675 million (excluding deductibles). Of this amount, at least as much as $230 million already had been committed to the 22,800 claims settled in principle at higher than recent historical averages, leaving only about $400 million in uncommitted product-liability insurance for new claim resolutions. *See* 1992 Annual Report. If the recent historical average of almost $10,000 per claim continues, the remaining uncommitted insurance will not cover the 62,500 claims pending and unsettled at the end of 1992 -- not to mention future claims or defense costs.

To cover the estimated *uninsured* costs of pending and additional claims through 1999, Owens-Corning established an unfunded, non-cash reserve valued at $950 million as of the end of 1992. [34a n.23.] *See* 1992 Annual Report. Of this amount, $824 million had been charged against 1991 earnings. *See Defendants Reveal Litigation Costs in Annual Filings*, Mealey's, May 1, 1992, at 14. Owens-Corning thus expects to spend about $1 billion of its own money for claims through 1999 -- in addition to the more than $2 billion its insurers will pay. Claims filed in the next century will require additional, uninsured expenditures.

Owens-Corning also has faced a growing number of punitive-damages awards. As of the end of May 1991, 11 awards totalling $19,950,000 in punitive damages had been entered against the company. [JA 1943-48.] As of today, 29 punitive-damages judgments have been entered, totalling $56,060,200 (including the $1 million judgment in this case). [134a-140a.]

## C. The Proceedings Below

Respondent William Dunn sued Owens-Corning and other asbestos manufacturers in 1987 under V.I. Code Ann. tit. 4, § 32(a), claiming he had developed asbestosis from his exposure to various asbestos-containing products during his employment. He alleged he had lost weight, was often short of breath and could no longer enjoy his former athletic endeavors because of his asbestosis -- although medical records prepared in conjunction with his orthoscopic knee surgery in 1990 showed that Dunn continued to participate in numerous sports activities, including running, rowing, swimming and weight-lifting.

Despite substantial evidence demonstrating that Dunn was not disabled, the jury awarded him $1.3 million in compensatory damages and $25 million in punitive damages. The district court denied Owens-Corning's post-trial motions but remitted the compensatory damages to $500,000 and the punitive damages to $2 million. [86a-128a.]

On appeal to the Court of Appeals for the Third Circuit, a majority of the panel further remitted the punitive-damages award to $1 million but otherwise affirmed the judgment. Judge Weis dissented, arguing that further awards of punitive damages should be prohibited because they violate Owens-Corning's due-process rights and threaten to deprive future claimants of relief. *Dunn v. HOVIC*, Prod. Liab. Rep. (CCH) ¶ 13,375 (3d Cir. Sept. 18, 1992). After Owens-Corning sought rehearing, the Third Circuit vacated the panel's judgment and granted rehearing *in banc*. [131a-132a.]

A majority of the *in banc* court acknowledged Judge Weis's "powerful dissent" [31a] but concluded that the punitive-damages award did not violate the Due Process Clause based on Owens-Corning's individual circumstances.[6] The majority stated that any attempted solution to the asbestos litigation crisis would be arbitrary and inadequate because the court could not fashion an effective national response [26a-27a]; it also deemed "a judicial opinion of an intermediate court" an inappropriate forum to resolve the issues in light of this Court's silence and congressional inaction [31a]. However, the court further remitted the punitive-damages award to

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6. The majority also held that the award did not violate Virgin Islands law, but this petition does not raise that issue. Nor does the petition question whether Owens-Corning's conduct could support an award of punitive damages.

$1 million because it believed the district court had not sufficiently considered the effect of successive awards in similar asbestos cases. [37a.]

In a dissent joined by four other judges, Judge Weis noted the "burgeoning litigation, corporate collapse, and future compensatory inadequacy" and determined that further awards of punitive damages violate due process because they are repetitive and disproportionate. [45a, 57a.] Focusing on a number of factors -- including (*i*) the repetitive and unlimited punishment for the same course of conduct, (*ii*) the enormous overall liability that Owens-Corning will bear, (*iii*) the total obliteration of all profits from the alleged misconduct, (*iv*) the potential threat to current and future claimants' ability to recover compensatory damages and (*v*) "the adverse effect on settlement of pending claims" [56a-66a] -- the dissenters concluded that "[t]he amounts awarded in prior litigation have been more than adequate to meet the needs of punishment and deterrence" and that an additional award "serves no rational purpose" [66a].

Judge Becker, who joined Judge Weis's opinion on the due-process issue, observed in a separate dissent that "the repetitive imposition of punitive damages upon Owens-Corning for failure to warn in connection with the same series of acts (the sale of asbestos products) has, in terms of the legal justification for punitive damages, become so irrational as to offend the due process clause." [67a.]

## REASONS FOR GRANTING THE WRIT

This petition squarely presents this Court with the opportunity to resolve an issue it has never yet addressed: the due-process implications of multiple awards of punitive damages in mass-tort litigation, and especially in asbestos cases. A majority of this Court has now recognized that due-process principles impose substantive limits on punitive damages. *See Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991); *see also TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993) (plurality opinion); *id.* at 2731-34 (O'Connor, J., dissenting). The question here is whether additional punitive damages unconstitutionally exceed those limits where (*i*) they no longer are needed to achieve the goals of punishment and deterrence because of the enormous, uninsured compensatory liability arising from hundreds of thousands of mass-tort claims, (*ii*) each new award constitutes repetitive and unlimited punishment for the same acts and (*iii*) additional punitive damages divert funds needed to compensate future plaintiffs for their injuries. Owens-Corning submits that, under these circumstances, punitive damages do not serve any rational purpose and are simply overkill, in violation of the Due Process Clause.

The need for this Court's intervention is critical. Lower courts have long recognized the due-process concerns raised here, but they have felt powerless to address those issues on a case-by-case, jurisdiction-by-jurisdiction basis in light of their national scope. As the sole judicial tribunal with nationwide jurisdiction, only this Court can resolve this crisis by establishing and imposing meaningful due-process guidelines governing asbestos cases and other mass-tort litigations.

## I.

## Continued Awards of Punitive Damages Violate Due Process Where They Are Not Needed To Punish or Deter, and Where They Inflict Unlimited and Repetitive Punishment for a Single Course of Conduct.

### A. Due Process Is Violated Where Additional Punitive Damages Are No Longer Needed To Punish or Deter.

Punitive damages are "a windfall to a fully compensated plaintiff." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Such damages "by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Id.* at 266-67.

As a majority of this Court confirmed in *Haslip* and *TXO*, these twin purposes -- punishment and deterrence -- impose substantive due-process limits on awards of punitive damages. *See Haslip*, 111 S. Ct. at 1045 (punitive damages must be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"); *see also TXO*, 113 S. Ct. at 2718 (plurality opinion) ("the Due Process Clause . . . imposes substantive limits 'beyond which penalties may not go'"); *id.* at 2731-34 (O'Connor, J., dissenting).[7]

This case presents a scenario not raised in either *Haslip* or *TXO*: mass-tort litigation, and the asbestos litigation in particular,

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7. *See also Morgan v. Woessner*, 997 F.2d 1244, 1255-56 (9th Cir. 1993).

where hundreds of thousands of claims have been filed, billions of dollars already have been spent, additional billions will be spent in the future, and the resources of an entire industry are being exhausted. In this particular context, and based on the type of record presented here, additional awards of punitive damages no longer bear any rational relationship to the goals of deterrence and punishment. Those goals already are being achieved through the staggering compensatory costs that defendants such as Owens-Corning must bear, and further awards of punitive damages thus amount to unconstitutionally excessive overkill.

In analyzing whether a punitive-damages award is excessive, this Court and others have considered a variety of factors, including (*i*) "the 'impact upon the parties'" and "the 'financial position' of the defendant," (*ii*) "the profitability . . . of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss," (*iii*) "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation," (*iv*) "the 'desirability of discouraging others from similar conduct'" and (*v*) "'the impact on innocent third parties.'" *Haslip*, 111 S. Ct. at 1044-45.[8] These factors demonstrate the superfluity and excessiveness of additional punitive damages in mass-tort contexts such as this one.

*First*, additional punitive damages are no longer needed to punish a defendant or to affect its finances where compensatory

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8. *See also Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1417-18 (4th Cir. 1992); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991); *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466, 481-82 (1986); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901-02 (Tenn. 1992); *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897, 908-10 (1991); Restatement (Second) of Torts § 908.

damages alone will serve those purposes. In Owens-Corning's case, almost 200,000 asbestos personal-injury claims already have been filed against the company, with more than 20,000 new claims arriving each year and no end in sight. Owens-Corning already has resolved more than 101,000 claims (for more than $1 billion in indemnity costs); its product-liability insurance is almost entirely committed or exhausted; and it expects to pay almost $1 billion of its own funds to cover the *uninsured* costs of pending and future personal-injury claims through 1999 -- not counting additional claims that might be filed in the next century. Moreover, as other asbestos defendants have become insolvent or financially unstable, Owens-Corning has had to pay an increasingly larger share of compensatory damage awards under principles of joint and several liability. Under these circumstances, as the five dissenting judges stated, "the avalanche of compensatory claims . . . has surely served as more of a punishment and deterrent than individual punitive assessments in isolated cases against manufacturers of other types of products." [49a.] *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967) (Friendly, J.) (noting risk of "overkill" in mass-tort context, where "heavy compensatory damages . . . should sufficiently meet the[] objectives" of deterrence and punishment).[9]

*Second*, additional punitive damages are not needed where -- as here -- a mass-tort defendant's uninsured liability

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9. *See also Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 886, 213 Cal. Rptr. 547, 552 (2d Dist.) ("the objectives of punishment and deterrence appear to be sufficiently met by the enormity of the present and prospective awards of compensatory damages"), *rev. denied* (Cal. 1985); *cf. Mirkin v. Wasserman*, No. S020465, 1993 Cal. Lexis 4451 at *47 (Cal. Sept. 9, 1993) ("the additional deterrent value of punitive damages does not appear to be needed [where] actual damages, alone, represent a potentially crushing liability").

entirely wipes out the profitability of the alleged misconduct and results in an enormous loss. [50a (Weis, J., dissenting).] Owens-Corning's total Kaylo sales over two decades amounted to only about $140 million, and profits were only about $1.4 to $7.7 million. The company's uninsured billion-dollar liability thus is approximately *seven times* its total sales and *125 to 700 times* its total profits from asbestos-containing Kaylo.

*Third*, additional punitive damages are not needed where other such damages have been awarded. In Owens-Corning's case, 29 judgments totalling $56,060,200 already have been entered (including this one). Even without the $1 billion in uninsured liability, these judgments would have to be taken in mitigation and would themselves constitute sufficient punishment and deterrence.[10]

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10. That Owens-Corning so far has paid only a portion of those judgments is not dispositive. In 1993 alone, Owens-Corning paid $4,380,000 in punitive-damages judgments [134a], not including the $1 million it paid in this case after the Third Circuit's mandate issued. Owens-Corning also has paid additional amounts (approximately $3 million to date) in various post-judgment settlements of punitive-damages awards. Another 18 judgments totalling $44,185,200 are still on appeal or otherwise unresolved, and additional payments probably will be required. [134a-140a.] *Cf.* Restatement (Second) of Torts § 908, comment e ("It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future").

The *in banc* majority's unwillingness to consider the punitive-damages components of Owens-Corning's post-judgment settlements [33a-34a] is perplexing: but for those pre-existing judgments, Owens-Corning would not have had any reason to pay the plaintiffs a premium in addition to their full compensatory damages.

*Fourth*, additional punitive damages are not needed where the alleged misconduct has long since ended. Owens-Corning stopped making and selling its asbestos-containing product 20 years ago, as did most other manufacturers of friable asbestos products. Thus, "[i]n asbestos cases, the imposition of punitive damages would not further the deterrent function since the manufacturers no longer use asbestos in their products." *Anstine v. ACandS, Inc.*, No. 3368-1 S 1984, slip op. at 4 (Pa. Ct. of Common Pleas, Dauphin County, Jan. 13, 1989).[11] Moreover, the business community and the public at large already know about the numerous asbestos-related bankruptcies and the tens of billions of dollars in indemnity costs that Owens-Corning and other asbestos defendants have incurred and will continue to incur. *See, e.g.*, Oliver & Spencer, *supra*, at 75. In light of this extensive publicity, it is inconceivable that the continued imposition of punitive damages on mass-tort defendants such as Owens-Corning would make other potential tortfeasors more careful or responsible than they otherwise would be.

*Fifth*, an excessiveness analysis in the mass-tort context should not ignore the impact of additional punitive damages on "'innocent third parties,'" *Haslip*, 111 S. Ct. at 1044, such as other personal-injury claimants. As five Fifth Circuit judges concluded eight years ago, "[t]here is a real and present danger that [asbestos defendants'] available assets will be exhausted before those later

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11. *See also Drayton v. Jiffee Chem. Corp.*, 395 F. Supp. 1081, 1098 (N.D. Ohio 1975) ("there would seem to be little deterrent value in inflicting punitive damages" where "many [competing products] presently on the market are uniformly characterized by safer formulation"), *modified on other grounds and aff'd*, 591 F.2d 352 (6th Cir. 1978); *Magallanes*, 167 Cal. App. 3d at 886, 213 Cal. Rptr. at 552 ("the objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace").

victims can seek the compensation to which they are entitled." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1330 (5th Cir. 1985) (*en banc*) (Clark, C.J., dissenting); *accord Findley v. Blinken*, 129 B.R. at 751 ("there is not enough money available from traditional defendants to pay for current and future claims"); *Abate v. ACandS, Inc.*, *supra*, slip op. at 26, Mealey's, Dec. 18, 1992, at C-13 (deferring payment of punitive damages in about 8,500 Baltimore asbestos cases "until all compensatory damages have been paid," because "unless the payment of punitive damages is deferred, future deserving plaintiffs will be unable to collect even compensatory damages"). Courts should not further jeopardize future claimants' ability to obtain compensation for their injuries by granting windfall punitive damages to earlier claimants who already have been fully compensated. [54a-56a (Weis, J., dissenting).]

The *in banc* majority dismissed this consideration by claiming that Owens-Corning had not shown it would be unable to pay future awards. [34a.] But that conclusion -- which in any event was predicated on mistaken and outdated assumptions about the company's reserves and insurance[12] -- misses the point.

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12. The majority incorrectly relied on Owens-Corning's $950 million asbestos reserve as "a further indication of the company's ability to pay" [34a n.23]. That reserve, however, is an unfunded, non-cash reserve; there is no money in the bank. The reserve is simply a balance-sheet entry reflecting an ascertainable future liability, and it must be funded through the company's future earnings. If those earnings are diverted to paying windfall punitive damages, money might not be available to pay compensatory damages.

The existence of this reserve for the *uninsured* $1 billion cost of asbestos claims through 1999 renders the majority's discussion of Owens-Corning's insurance essentially superfluous. Moreover, the $1.26 billion and $1.13 billion insurance figures the majority cited [34a & n.23] are now out of date. As shown above, Owens-Corning had only about $675

(continued...)

Punitive damages are intended only to sting a defendant, not to destroy it. *E.g.*, *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992) ("award should not be so high as to result in the financial ruin of the defendant").[13] Even a solvent company can devote only finite resources to paying personal-injury claims while still conducting its business -- and Owens-Corning already expects to pay about $1 billion for *uninsured* claims through 1999. As the five dissenters realized, "[i]f bankruptcy is the test [of excessiveness], then due process relief will always come too late." [65a.] Moreover, the sole purposes of punitive damages are to punish and deter. If those purposes already are being served by a defendant's overall liability, additional punitive damages should not be imposed merely because the defendant might be able to pay them. Finally, issues about the continued availability of punitive damages in asbestos and other mass-tort cases go beyond Owens-Corning's own current financial condition. If punitive damages continue to be awarded, other defendants can become insolvent, thereby increasing the financial pressures on presently solvent companies such as Owens-Corning.

For all these reasons, serious constitutional questions exist about whether additional punitive damages in mass-tort contexts such as this one still serve their permissible goals of punishment and deterrence. "'[T]o punish the guilty beyond their guilt is not

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12.(...continued)
million in unexhausted product-liability insurance (excluding deductibles) by the end of 1992. And only about $400 million of that amount was uncommitted and still available to resolve pending or new claims.

13. *Accord Arab Termite & Pest Control of Fla. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982); *Fraidin v. Weitzman*, 93 Md. App. 168, 611 A.2d 1046, 1068-69 (1992), *cert. denied*, 329 Md. 109, 617 A.2d 1055 (1993).

different from punishment of the innocent, and it cannot be done in a manner consistent with ordinary notions of justice.'" [58a (Weis, J., dissenting) (quoting Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 854 (1989)).]

## B. Repetitive and Unlimited Awards of Punitive Damages for a Single Course of Conduct Also Violate Due Process.

Apart from being unnecessary to punish or deter, punitive damages in mass-tort litigation can inflict multiple and unlimited punishments for a single course of conduct. Due-process principles prohibit such unconstrained and excessive punishment for the same offense.

> A defendant has a due process right to be protected against unlimited multiple punishment for the same act . . . because overlapping damage awards violate that sense of "fundamental fairness" which lies at the heart of constitutional due process. Certainly the principle of *res judicata*, the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is part of the process that is due under our constitutional system.

*In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated on other grounds*,

693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).[14]

Courts generally have concluded that a defendant's manufacture and/or distribution of an allegedly defective product is a single, continuous course of conduct, regardless of the number of plaintiffs purportedly harmed by those acts. *E.g.*, *In re School Asbestos Litig.*, 789 F.2d at 1003-05; *Juzwin I*, 705 F. Supp. at 1061. And yet, multiple awards of punitive damages continue to be imposed. In Owens-Corning's case, 29 such judgments totalling $56,060,200 already have been entered -- in addition to the billions of dollars in compensatory liability -- all for the company's single course of conduct in making and selling asbestos-containing Kaylo.

As one court has said of asbestos cases, "it is totally unrealistic to suggest that each [punitive damages] award is predicated solely on the conduct of the defendant manufacturer as it relates only to the plaintiff on trial." *Juzwin I*, 705 F. Supp. at 1056. The Due Process Clause does not permit such limitless punishment for the same acts. *See* 62a (Weis, J., dissenting)

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14. *Accord Juzwin II*, 718 F. Supp. at 1234 ("repetitive awards of punitive damages for the same conduct violate a defendant's due process rights"); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); *see also Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle"); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting); *Magallanes*, 167 Cal. App. 3d at 888-89, 213 Cal. Rptr. at 554; Judge William W. Schwarzer, *supra*, at 116.

("Basic notions of due process are offended by punishment that occurs over and over again as has happened in asbestos litigation.").[15]

### C. The Due-Process Violation Becomes Particularly Egregious Where Punitive Damages Have Exceeded Their Purposes and Still Continue To Be Imposed in Unlimited Amounts for a Single Course of Conduct.

Mass-tort litigation raises especially compelling due-process issues about punitive damages because both types of violations discussed above generally occur. The due-process concerns thus arise not only from punitive damages' excessiveness or from their repetitiveness but from the combination of these two problems. This combination exacerbates the award's unconstitutionality and particularly disturbed the five dissenters [56a-66a, 67a].

The compound problem is endemic to mass-tort litigation -- and is especially severe in the asbestos context. Punitive damages evolved under circumstances very different from those of today's mass-tort litigation: they often were awarded only where the amount of *compensatory* damages was too small to punish the wrongdoer or to deter others, and they usually involved only a single plaintiff (or a few plaintiffs), so that "a punitive recovery by

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15. This case does not necessarily require the Court to rule that only one award of punitive damages may ever be imposed for a single course of conduct under any set of circumstances. In Owens-Corning's situation, 29 judgments totalling more than $56 million already have been entered -- not even counting the company's $1 billion uninsured overall liability. Wherever the Court might choose to draw the due-process line on multiple awards of punitive damages, the aggregate number and amount of awards against Owens-Corning is well past it.

[the plaintiff] ends the matter, except for such additional liability as may be provided by the criminal law." *Roginsky*, 378 F.2d at 838; *see also In re School Asbestos Litig.*, 789 F.2d at 1003-04; John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 141-47 (1986).

Mass-tort cases, however, present a radically different situation. The coalescence of hundreds of thousands of plaintiffs, seemingly endless litigation, ruinous compensatory damages and numerous corporate bankruptcies can itself accomplish the societal goals of punishment and deterrence that punitive damages were designed to achieve in single-victim cases often involving only minimal compensatory damages. In this mass-tort context, additional punitive damages become unnecessary, irrational and unconstitutionally excessive.

Mass-tort litigation -- especially the asbestos litigation -- thus poses unique and particularly serious due-process issues, elevating the excessiveness and repetitiveness problems of punitive damages to levels previously unknown. Those problems have dramatic consequences for the hundreds of thousands of asbestos and other mass-tort litigants, the judicial system, and American industry and society as a whole.

## II.

## This Court Must Intervene Because the Lower Courts Have Proven Unable To Deal with the Problems of Unnecessary and Repetitive Awards of Punitive Damages in Mass-Tort Litigation.

Mass-tort litigation -- and the asbestos litigation in particular -- has become a nationwide crisis that shows no sign of ending. The longer additional awards of punitive damages remain available, the greater the likelihood that this crisis will worsen: due-process violations will increase, federal and state courts will become even more overwhelmed with personal-injury claims, additional defendants will be forced to seek bankruptcy protection, and future claimants might eventually be left without relief. As the five dissenting judges warned, "it is already late in the day." [54a.]

This Court is the only one in the nation that can resolve these issues. The state courts and lower federal courts will not -- and cannot -- do so.

*First*, individual courts "perhaps understandably" have treated the problems of punitive damages in mass-tort litigation "in a parochial and near-sighted manner." *In re School Asbestos Litig.*, 789 F.2d at 1001. No court in the nation -- except for this Court -- can control the actions of tribunals in other jurisdictions to ensure that total punitive-damages awards rendered in mass-tort actions throughout the country neither exceed the amount needed to deter and punish nor constitute multiple punishment for the same conduct. Rather, an individual court most likely will not "wish to deny its litigants the benefits that are available in another jurisdiction." *Id.* As Judge Friendly warned,

> we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because [plaintiffs] in California and . . . New York had stripped that cupboard bare, even assuming the defendant would want such a charge, and still more unrealistic to expect that the jury would follow such an instruction or that, if they didn't, the judge would reduce the award . . . .

*Roginsky*, 378 F.2d at 840. In fact, any attempt by a single court to adopt a far-sighted, global approach to punitive damages actually "is discouraged because other jurisdictions are not required to adopt a similarly enlightened viewpoint. A forum wishing to take the long-range view might find that its efforts were not only ineffective but unfair to its citizenry because claimants in the other states could drain off all the assets available for satisfaction of claims." *In re Asbestos School Litig.*, 789 F.2d at 1001.[16]

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16. *Accord Garnes*, 413 S.E.2d at 905 (West Virginia courts cannot do anything "that will have any impact whatsoever on the set of economic trade-offs that occur in the national economy" because "trying unilaterally to do so will only punish West Virginians without improving the system for anyone else"); *Fischer v. Johns-Manville Corp.*, 512 A.2d at 478 (limits on punitive damages "would be ineffective unless applied uniformly. To adopt such a cap in New Jersey would be to deprive our citizens of punitive damages without the concomitant benefit of assuring the availability of compensatory damages for later plaintiffs. This we decline to do."); Testimony of Justice Richard Neely Before Senate Commerce Committee, Sept. 12, 1991, at 9-10 ("[b]y trying unilaterally to [improve West Virginia's product-liability system], we will succeed only in impoverishing our own state's residents without doing anyone, anywhere, any measurable good"), *cited in* Lester Brickman, *supra*, at 1833 n.52.

*Second*, in the absence of guidance from this Court, lower courts have refused to tackle the novel and substantial constitutional questions raised here -- and, like the *in banc* majority [32a], even have relied on this Court's previous silence as tacit approval of punitive damages in mass-tort litigation. This reliance is incorrect. Mass-tort issues simply had not arisen in *Haslip*, *TXO* or this Court's other punitive-damages decisions, so the Court had no reason to express any opinion about them. And this Court's denials of certiorari in other cases should not be deemed an expression of the Court's views. The Court now should take this opportunity to rule on the issues -- because no lower court appears willing to do so unless this Court acts first.

*Third*, a judicial solution to these important national questions is entirely appropriate. Punitive damages in tort cases are a common-law and judicial creation, and due-process issues are the province of the judiciary. The judiciary's insistence on "looking backward to the signposts of *stare decisis*," *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 415 (5th Cir.) (*en banc*) (Clark, C.J., dissenting), *cert. denied*, 478 U.S. 1022 (1986), and its unwillingness to confront the new problems posed by punitive damages in mass-tort actions have led to the present emergency. As the five Third Circuit dissenters stated, "[m]istakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area." [53a]; *accord* Judge R. Barclay Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 Dick. L. Rev. 265, 301 (1983) (judiciary "can and should address the problems created by the continued use of the judge-made doctrine of punitive damages as it relates to asbestos litigation").

A number of judges throughout the country have called for this Court to address punitive damages in mass-tort litigation -- especially in asbestos cases. Five dissenting members of the *en banc* Fifth Circuit declared in 1986 that this Court "is [the] only one right court to [resolve these problems] . . . . [T]he problems we face in this litigation are ones of national public policy." *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d at 417 (Clark, C.J., dissenting).[17] And in yet another asbestos case, the Fifth Circuit itself recently voiced "misgivings" about prior, binding Circuit law because "'[w]e have the greatest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.'" *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990) (quoting *Roginsky*, 378 F.2d at 839), *cert. denied*, 111 S. Ct. 2236 (1991).

Not only is this Court's resolution of the due-process issues both necessary and appropriate; the Court should address them *now*. As shown above, lower courts have refused to take the initiative even as they have acknowledged the significant policy and constitutional concerns raised here. Any additional delay will only aggravate the crisis in the asbestos litigation and in other mass-tort cases. The time has come to stop the imposition of unnecessary and excessive punishment, the repetitive damage awards for the same course of conduct, and the diversion of funds needed for compensating future plaintiffs -- and to reduce the disincentives to

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17. *Accord Jackson*, 750 F.2d at 1335-36 (Clark, C.J., dissenting); *see also Racich*, 887 F.2d at 399 (constitutional reform of punitive damages in asbestos cases "is best left for Congress or for higher judicial authority"); *Juzwin II*, 718 F. Supp. at 1235 (noting "powerless[ness]" to address due-process issues in asbestos cases "absent uniformity either through legislation or a Supreme Court determination").

settlement and the resulting docket congestion created by the lure of million-dollar punitive-damages awards.

## CONCLUSION

The Court therefore should grant Owens-Corning's petition for a writ of certiorari.

Respectfully submitted,

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